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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

ARTHUR CALDERON, Warden of
San Quentin Prison and
DANIEL E. LUNGREN,
Attorney General

Petitioners,

v.

BERNARD LEE HAMILTON,

Respondent.

PETITION FOR WRIT OF CERTIORARI FROM JUDGMENT OF REVERSAL BY THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (MARY M. SCHROEDER, BETTY B. FLETCHER, AND STEPHEN S. TROTT, CIRCUIT JUDGES)

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QUESTIONS PRESENTED

1. Did a two judge majority of the Ninth Circuit panel improperly set aside a state court death sentence based on a finding of error in a penalty phase jury instruction regarding California's commutation procedures, where the instruction given was more favorable to the defendant than the one approved by this Court as constitutional in California v. Ramos, 463 U.S. 992?

2. Can a federal court set aside a state court death sentence based on a purported instructional error in the penalty phase without applying the reasonable likelihood test of Boyde v. California, 494 U.S. 370, or the harmless error test of Brecht v. Abrahamson, 507 U.S. ___ 123 L. Ed. 2d 353; 113 S. Ct. 1710?

3. Does a federal court create a new rule of law within the meaning of

Teague v. Lane, 489 U.S. 288, when it finds reversible error in a penalty phase instruction on commutation which is more favorable to the defendant than the commutation instruction which this Court expressly found constitutional in California v. Ramos, 463 U.S. 992?

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Petitioners respectfully petition for a writ of certiorari to review the judgment of United States Court of Appeals for the Ninth Circuit reversing the judgment of death in this case.

OPINIONS BELOW

On February 3, 1994, the Ninth Circuit, in a 2-1 decision (Justice Trott

dissenting) issued an opinion reversing the death penalty of Bernard Lee Hamilton on the basis that the modified instruction on commutation violated his due process and Eighth Amendment rights. Hamilton v. Vasquez, ___ F.3d ___, 94 Daily Journal D.A.R. 3684; Appendix A.

JURISDICTION

This Court has jurisdiction under sections 1651, subdivision (a), and 2254, of Title 28 of the United States Code and Rule 20.1 of the United States Supreme Court Rules.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Amendments Eight and Fourteen.

STATEMENT OF THE CASE

A. Facts of the Crime.

On the evening of May 20, 1979, 24-year-old Eleanore Buchanan had dinner with her husband and two infant sons, and then left for her college math class in

their new van. Her body was found the next morning near Pine Valley, California. Mrs. Buchanan's head and hands were severed from her body and have never been found. Hamilton was arrested in Oklahoma on June 8, 1979, while driving the victim's van. People v. Hamilton, 41 Cal.3d 408, 413-419, 221 Cal. Rptr. 902, 710 P.2d 981 (1985) ("Hamilton I"); People v. Hamilton, 45 Cal.3d 351, 356, 247 Cal.Rptr. 31 753 P.2d 1109 (1988) ("Hamilton II").

A. Procedural Background

1. Direct Appeal

A jury convicted Hamilton of the 1979 murder of Eleanore Buchanan during the course of robbery, kidnapping and burglary, and he was sentenced to death on March 2, 1981. The California Supreme Court set aside the special circumstance finding and reversed the penalty of death after a majority of the court concluded

that it was possible Hamilton did not intend to kill Mrs. Buchanan. Hamilton I, 41 Cal.3d 408.

This Court granted California's petition for writ of certiorari, and remanded the case to the California Supreme Court in light of Rose v. Clark, 478 U.S. 570 (1986). California v. Hamilton, 476 U.S. 1301 (1986).

The California Supreme Court affirmed Hamilton's conviction and sentence of death. Hamilton II, 45 Cal.3d 351. The penalty phase commutation instruction was found erroneous under state law despite its lack of federal infirmity but the California Supreme Court held the error harmless in Hamilton's case because the jury had been instructed "not to make any use of the commutation instruction in determining the penalty to be imposed on a defendant." Hamilton II, 45 Cal. 3d at 375.

On January 23, 1989, this Court denied Hamilton's petition for writ of certiorari. Hamilton v. California, 488 U.S. 1047 (1989).

2. Collateral Review

The California Supreme Court has denied seven petitions for writ of habeas corpus collaterally attacking Hamilton's conviction and sentence of death.

The federal district court has denied five petitions for writ of habeas corpus collaterally attacking Hamilton's conviction and sentence of death. Hamilton's first federal petition for writ of habeas corpus was filed in the United States District Court for the Southern District of California (hereinafter "district court") on April 2, 1986. Hamilton v. Vasquez, Case No. 86-0809-T. Hamilton raised claims of ineffective assistance of counsel and denial of the right of self-representation. The

petition was denied on the merits on September 4, 1986. On September 24, 1987, the Ninth Circuit Court of Appeals vacated the judgment as premature based on Hamilton's failure to exhaust state court remedies. On September 30, 1987, the petition was dismissed without prejudice to refiling the petition following exhaustion. The issues in the petition were subsequently raised in a third petition filed in the district court. Appendix B at 111-113.

A second petition was filed in the district court on October 9, 1986. Hamilton v. Vasquez, Case No. 86-2101-B. Hamilton claimed that shackling him during trial violated his constitutional rights. The petition was denied by the district court on the merits on November 19, 1987. Following an appeal to the Ninth Circuit, the case was remanded on August 23, 1989, with directions to the district court to

review and consider the entire state court record and take more evidence, if appropriate, before ruling on the petition. Hamilton v. Vasquez, 882 F.2d 1469, 1473 (9th Cir. 1989). The claims in the second petition were subsequently consolidated with Hamilton's fifth federal habeas petition. Appendix B at 112-113.

A third petition which raised the same claims contained in Hamilton's first federal petition was filed in the district court on September 30, 1987. The petition was dismissed by the district court on August 31, 1988. See Appendix B, at 113. Hamilton's subsequent appeal to the Ninth Circuit was also dismissed on September 7, 1990, as moot in light of the Ninth Circuit ruling in Hamilton v. Vasquez, 882 F.2d 1469 (9th Cir. 1989) which remanded Hamilton's second federal petition to the district court for further proceedings. Appendix B at 113.

A fourth petition was filed on June 20, 1989, in the United States District Court for the Northern District of California claiming ineffective assistance of counsel, denial of a fair trial, denial of due process, and a denial of access to the prison library. The petition was transferred to the United States District Court for the Southern District of California. The district court denied the petition on July 19, 1989, after finding that the grounds for relief, either were, or should have been, presented in previous petitions to the court. Appendix B at 113-114.

A fifth petition was filed in the district court on March 7, 1990. Hamilton v. Vasquez, Case No. 90-0291-B. The fifth petition was consolidated with Hamilton's second federal petition (case number 86-2101-B) on June 8, 1990. Appendix B at 114.

After being ordered to identify all of his known issues and to exhaust all claims in state court, Hamilton filed his "amended" petition in the district court on October 22, 1990. Appendix B at 114-121.

The district court has held that Hamilton's petition of October 22, 1990, (consolidated second and fifth federal petitions) constitutes his "first" petition for purposes of Rule 9(b) of the Rules Governing Section 2254 Proceedings regarding successive and abusive petitions. This amended and consolidated "first" petition proceeded to an evidentiary hearing. Appendix B at 120.

3. District Court Evidentiary Hearing and Appeal

On April 23, 1991, a three-week evidentiary hearing commenced in the district court before the Honorable Rudi M. Brewster, on issues of shackling and ineffective assistance of counsel,

including defense investigation of Hamilton's whereabouts and defenses. Hamilton was transported from death row at San Quentin state prison in Northern California to the federal courthouse in San Diego in early April, and was present in court throughout the proceeding. Appendix B at 120.

At the conclusion of the evidentiary hearing, Hamilton moved to have the hearing held open to enable him to investigate and present additional claims. The district court denied the request, citing its previous orders requiring Hamilton to pursue unexhausted claims in state court and exhausted claims in federal court by October 22, 1990, and its order finding that Hamilton had in fact waived all such claims. Appendix B at 115-120, 271.

Extensive written briefs were filed by the parties following the

evidentiary hearing. On July 1, 1991, Hamilton requested a stay of the federal proceedings and funds for investigation of potentially meritorious claims. On August 20, 1991, the district court denied the request for a stay.

On August 23, 1991, the district court filed a 93 page opinion denying the petition for writ of habeas corpus. Appendix B at 110-273. The district court found the commutation instruction "not constitutionally infirm" and "[m]ost importantly, the modifications agreed to by the parties improved the unmodified commutation instruction from the defense perspective." Appendix B at 248. The district court denied Hamilton's in pro per motion for reconsideration on September 10, 1991. Hamilton's counsel's motion to alter or amend the judgment was denied on October 31, 1991.

On November 13, 1991, a certificate of probable cause was granted and a stay issued pending disposition of Hamilton's appeal of the denial of the petition for writ of habeas corpus before the Ninth Circuit Court of Appeals.

On March 17, 1992, Hamilton filed a motion pursuant to Rule 60(b) of the Federal Rules of Civil Procedure seeking to reopen the district court proceedings in order to amend his habeas corpus petition to bring additional claims. On July 1, 1992, the district court issued an order stating it would entertain the motion if the Ninth Circuit remanded the case for consideration of the motion. Following remand by the Ninth Circuit, a hearing was conducted on the Rule 60(b) motion on August 25, 1992, and it was denied on September 28, 1992. Hamilton appealed. Hamilton v. Vasquez, 93-55039. The Ninth Circuit consolidated

Hamilton's appeal from the denial of his consolidated amended petition for writ of habeas corpus with his appeal from the denial of his Rule 60(b) motion.[1]

4. The Published Reversal

On February 3, 1994, the Ninth Circuit majority reversed the district court's denial of habeas corpus relief on Hamilton's claim that the modified commutation instruction given in the

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1. During the pendency of his appeal to the Ninth Circuit, Hamilton has filed two more petitions for habeas corpus in the district court. His sixth petition, filed in pro per, raises nine claims of ineffective assistance of trial and appellate counsel, denial of constitutional rights based on an 18-day adjournment during deliberations in his state court trial and the denial of a request for self representation. Hamilton v. Vasquez, CV-92-1837-B. On March 31, 1992, Hamilton's counsel filed a petition for habeas corpus raising 16 claims. Hamilton v. Vasquez, CV-92-474-B. Answers asserting an abuse of the writ and successive petitions have been filed to both of these petitions, a traverse was filed on or about January 18, 1994, and the petitions are pending in the district court.

penalty phase of his trial violated his Eighth and Fourteenth Amendment rights and required a new penalty phase trial. Hamilton v. Vasquez, ___ F.3d ___; Appendix A, at 71-72. The unmodified commutation instruction has been found constitutional by this Court. California v. Ramos, 463 U.S. 992 (1983). On remand, the state court found the commutation instruction violated the California Constitution. People v. Ramos (Ramos II) 37 Cal. 3d 136, 150-159, 689 P.2d 430 (1984). Despite that fact, the California Supreme Court concluded that the California error created by Hamilton's commutation instruction in this case "was non-prejudicial." People v. Hamilton, 45 Cal. 3d 351, 375, 247 Cal. Rptr. 31, 753 P.2d 1109 (1988). It also found the prosecutor's comment that Hamilton would connive and devise ways to manipulate the system was neither intended to refer to

the commutation instruction nor that the jury so understood it. Id., at 375-376.

The Warden of San Quentin Prison and the Attorney General of the State of California petition for certiorari to correct the Ninth Circuit two judge majority's misinterpretation of federal and state law in reversing the judgment of death.

On March 31, 1994, Judge Schroeder of the Ninth Circuit granted a 30 day stay in the issuance of the remittitur so that the state could bring this petition. Appendix C.

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REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the two judge majority of the Ninth Circuit panel has denied the state its right to enforce its criminal laws by reversing a judgment of death based on perceived misstatements of state law in a jury instruction and conjecture about jurors not following instructions. The Ninth Circuit two judge majority achieved an untenable interpretation of a penalty phase jury instruction in order to bypass this Court's holding in California v. Ramos, 463 U.S. 992 (1983). The majority then found the instruction constituted reversible error without engaging in the analysis required by Boyde v. California, 494 U.S. 370 (1990) and Brecht v. Abrahamson, 507 U.S. ___, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993). In bypassing the holding in Ramos and reversing the death sentence in this case, the Ninth

Circuit majority has also violated this Court's holding in Teague v. Lane, 489 U.S. 288 (1989) by retroactively applying a new rule of law on collateral review.

While California no longer requires instruction of the jury with the penalty phase instruction approved by this Court in Ramos, there remain several capital cases, which are still pending federal habeas review, wherein the instruction to the jury was identical to the instruction given in this case. See e.g., People v. Coleman, 46 Cal.3d 749, 780-782, 251 Cal. Rptr. 83, 759 P. 2d 1260 (1988), United States District Court, Northern District No. 89-1906 RMW; People v. McLain, 46 Cal.3d 97, 119-120, 249 Cal. Rptr. 630, 757 P. 2d 569 (1988), United States District Court, Central District, Case No. CV-89-3061-JGD; People v. Whitt, 51 Cal.3d 620, 655-657, 274 Cal. Rptr. 252, 798 P. 2d 849 (1990), United States

District Court, Central District, petition not yet filed. Six to eight other California capital cases may also be at risk from the holding in this case. Accordingly, the validity of the instruction itself, and the retroactive application of a new rule of law in the published opinion of the Ninth Circuit affects considerably more than nearly 15 years of litigation by the People of California to bring Bernard Hamilton to justice.

The district courts will be bound by the two judge majority opinion in this case. See, United States v. Bagley, 659 F.Supp. 223, 227 (W.D. Wash. 1987) citing Boys Markets Inc. v. Retail Clerks Union, 398 U.S. 235, 240-241 (1970); see Barreto v. United States, 694 F.2d 603, 607 (9th Cir. 1982). Moreover, absent being overruled by the Ninth Circuit Court of Appeals en banc or an opinion of this

Court, no other panel of the Ninth Circuit can depart from the two judge majority opinion in this case. Bonin v. Vasquez, 999 F.2d 425, 428 (9th Cir. 1993) citing United States v. Washington, 872 F.2d 874, 880 (9th Cir. 1989); see also, United States v. Hardesty, 977 F.2d 1347, 1347-1348 (9th Cir. 1992); Morton v. DeOliveira, 984 F.2d 289, 292 (9th Cir. 1993). Thus, at a minimum four California death sentences are imperiled by this single two judge opinion.

Moreover, beyond the commutation instruction itself, the Ninth Circuit majority's refusal to adhere to the reasonable likelihood test enunciated by this Court in Boyde v. California in reviewing claims of instructional error in the penalty phase of capital cases and failure to apply the harmless error standard set forth in Brecht v. Abrahamson to non-systemic error in the penalty phase

of capital cases has broad implications. There are approximately 624 condemned inmates in state prisons in seven states having a death penalty within the jurisdiction of the Ninth Circuit Court of Appeals. Accordingly, the encroachment of the Ninth Circuit into matters of state law for the purpose of reversing judgments of death threatens a basic and fundamental denial of due process of law, not just to California, but to all states within the jurisdiction of the Ninth Circuit.

Additionally, the two judge majority opinion improperly denies California the ability to rely upon the precedent of this Court, by retroactively applying a new rule of law on collateral review. By reversing a sentence of death based on a jury instruction which is more favorable to the defendant than the instruction expressly upheld by this Court in California v. Ramos, the Ninth Circuit

has necessarily created a new rule of law. The two judge majority opinion ignores the bar to retroactive application of new rules of law on collateral review. Teague v. Lane, 489 U.S. 288, rhg. den. 490 U.S. 1031. In failing to apply Teague to preserve the death sentence in this case, when no recognized exception to Teague applies, the Ninth Circuit opinion necessarily creates a new exception to Teague which should not be permitted to stand.

For the reasons stated in the well-reasoned dissent of Judge Trott, Petitioners respectfully urge this Court once again to grant Petition for Writ of Certiorari in this matter.

INTRODUCTION

On February 3, 1994, the Ninth Circuit Court of Appeals issued an opinion reversing the death penalty of Bernard Lee Hamilton on the basis that the modified

commutation instruction violated his due process and Eighth Amendment rights, requiring a new penalty phase trial. The majority has reversed a state judgment of death based on a commutation instruction more favorable to the defendant than the one approved by this Court as constitutional in California v. Ramos, 463 U.S. 992 (1983). To reach its result, the Ninth Circuit two judge panel majority misinterprets the language of the commutation instruction, erroneously assumes it misstated California law and misinterprets both Boyde v. California, 494 U.S. 370, and California v. Ramos. Furthermore, the majority neither conducts a prejudice analysis nor states what standard it used in arriving at its finding of prejudice. In short, it has granted habeas relief without federal constitutional error, without undertaking an appropriate harmless error analysis or

applying any standard for harmless error and retroactively applied its new rule of constitutional law in violation of Teague v. Lane, 489 U.S. 288.

Eight years ago this Court granted the state's petition for writ of certiorari. California v. Hamilton, 476 U.S. 1301. After 15 years of litigation, the state once again turns to this Court to enable the People of California to bring Bernard Hamilton to Justice.

ARGUMENT

I

THE MAJORITY REVERSED A DEATH PENALTY CASE BASED ON A PERCEIVED VIOLATION OF STATE LAW AND MISINTERPRETATION OF CALIFORNIA V. RAMOS

At the time Hamilton was tried, the Briggs commutation instruction was mandated by the California Constitution and provided as follows:

> "You are instructed that under the state constitution, a governor is empowered to grant a reprieve, pardon or commutation of a sentence following conviction of a crime. Under this power a governor may in the future commute or modify a sentence of life imprisonment without possibility of parole to a lesser sentence that could include the possibility of parole."

That instruction was approved by this Court in California v. Ramos, 463 U.S. 992, 995-996, (1983).[2/] In Hamilton's

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2. The Ninth Circuit majority correctly observes that the Briggs instruction is no longer given because the California Supreme Court on remand found that it violated California's due

case, the governor could not commute the life sentence without possibility of parole to life with possibility of parole unless at least four of the California Supreme Court Justices gave prior approval, because Hamilton had been convicted of two prior felonies. Cal. Const., Art. V, § 8; Cal. Pen. Code, § 4852. Consequently, the instruction ultimately given with the consent of both parties modified the commutation instruction in this case to state:

> "You are instructed that under the state constitution, a governor is empowered to grant a reprieve, pardon or commutation of a sentence following conviction of a crime. Under this power, a governor may, in the future, commute or modify a sentence of life imprisonment without a possibility of parole

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process clause. People v. Ramos, 37 Cal. 3d 136, 689 P. 2d 430 (Ramos II) (1984), cert. den. 471 U.S. 1119 (1985). However, the instruction suffers no infirmity under the United States Constitution. California v. Ramos, 463 U.S. at 992.

to a lesser sentence that would include the possibility of parole.

"This is subject to the requirement that in the case of any person twice convicted of a felony, a commutation or modification may not be granted absent the written recommendation of at least four justices of the California Supreme Court. Further, a life sentence requires a minimum incarceration of 25 years, less one-third off for good time credit before parole may be considered by the proper authorities.

"<u>You are now instructed, however, that the matter of a possible commutation or modification of instruction is not to be considered by you in determining the punishment for Mr. Hamilton. You must not speculate as to whether such commutation or modification would ever occur</u>.

"It is not your function to decide now whether this man will be suitable for parole at some future date. So far as you are concerned, you are to decide only whether this man shall suffer the death penalty or whether he shall be permitted to remain alive." State RT 4667-4668, emphasis added.

There was no federal constitutional error in this instruction. The first paragraph is basically the

instruction expressly approved by this Court in California v. Ramos. The instruction in Hamilton's case, as in Ramos, essentially told the jury that the alternate sentence was "life imprisonment with possibility of commutation." No credible argument can be made that, contrary the holding in Ramos, "the Constitution prohibits this State from accurately characterizing its sentencing choices." California v. Ramos, 463 U.S. at 105, fn 19.

To avoid the binding effect of Ramos, the Ninth Circuit majority attempts to distinguish it by attacking the modification made to the instruction in this case as a misstatement of state law that caused the jury to speculate. The majority states "[T]he two-sentence Briggs instruction upheld in Ramos was inapplicable to Hamilton because, unlike the defendant in Ramos, Hamilton was a

twice-convicted felon and therefore was subject to different commutation requirements." Hamilton v. Vasquez, ___ F.3d ____; Appendix A. at 45-46. While the commutation requirements in California are in fact different for twice convicted felons, that difference does not in any way support a conclusion that the commutation instruction was inapplicable to Hamilton's case. The commutation instruction was mandatory under the California Constitution when Hamilton was tried, irrespective of whether he was a twice convicted felon. Moreover, nothing in the holding in Ramos suggests that California was any less entitled to inform its jury about the sentencing choices because Hamilton was a twice convicted felon.

The only conceivable complaint would be if the jury was misinformed by an unmodified commutation instruction denying

them the knowledge that Hamilton would face additional hurdles for commutation as a twice convicted felon. No such complaint is viable here, as the trial court prudently modified the instruction to give information tailored to the case. The jury was not left with any misimpression that Hamilton's possibility of commutation was greater than that actually allowed by law.

The majority opinion erroneously states that the instruction given in Hamilton's case misstated California law. The California Supreme Court found no such misstatement.[3/] Despite this Court's holding that a federal court has no basis for disputing a state's interpretation of its own laws (Clemons v. Mississippi, 494

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3. The Ninth Circuit's interpretation of California's commutation law is also inconsistent with the interpretation by Hamilton's own attorneys which can be inferred from their consent to the instruction given below. State RT 4667-4668.

U.S. 738 (1990)), the Ninth Circuit majority ignores the import of California's application and interpretation of its own laws.

Contrary to the Ninth Circuit majority's assertion, Hamilton's jury was never told that "if it sentenced Hamilton to life imprisonment without possibility of parole, he would be eligible for parole after serving only 16 year and 8 months in prison." Hamilton v. Vasquez, ___ F.3d ___; Appendix A. at 47. The instruction given in this case accurately stated the law of commutation, including the added hurdles Hamilton would face for commutation. The modifications made the instruction more favorable to the defense than the instruction approved by this Court in Ramos. Additionally, Hamilton received the benefit of an admonition to the jury to disregard the possibility of

commutation in determining the appropriate penalty.

The district court properly concluded that the instruction given favored Hamilton by telling jurors the possibility for parole was "remote." Appendix B. at 249. It in fact told them that there were legal restrictions to changing any life without possibility of parole sentence to life with possibility of parole for someone with Hamilton's record. Four justices of the Supreme Court would have to recommend it and the Governor would have to agree. Even if that all happened the jury was told additionally that Hamilton would have to serve a minimum of nearly 17 years to even be eligible for parole, following any commutation. Finally, unlike Ramos, this jury was expressly told not to speculate about future action by government officials, was refocused on its proper

function to decide which of the two penalties was appropriate for Hamilton and was expressly told it must assume that the governor, Supreme Court and those officials charged with operation of the parole system would perform their duties in a correct and responsible manner and that "Mr. Hamilton will not be paroled unless he can be safely released into society." State RT 4669.

The Ninth Circuit majority rejects the fact that the instruction was more favorable to Hamilton than the instruction approved in Ramos by contending it is inconsistent to instruct the jury regarding the possibility of commutation only to then admonish the jury to disregard the possibility of commutation in reaching a verdict on the appropriate penalty in the case. The majority's point ignores the fact that the commutation instruction was mandatory

under the California Constitution. Consequently, it is disingenuous to conclude, as the majority did here, that the fact that the jury was not to consider the possibility of commutation modification or parole in the future was "wholly inconsistent with the prosecution's request that the jury be expressly instructed to consider the governor's power of commutation." Hamilton v. Vasquez, ___ F.3d ____; Appendix A. at 47-48. There is absolutely no inconsistency in the prosecutor's request for the instruction mandated by the state constitution and the jury being admonished not to consider commutation.

The majority's criticism ignores the reality that jurors might know about the commutation power and have inaccurate information which would lead them to conclude that the defendant was likely to get out of prison if they did not vote for

death. This Court acknowledged this purpose when it said that the "instruction invites the jury to predict not so much what some future Governor might do, but more what the defendant himself might do if released into society." California v. Ramos, at 1005.

By giving the jury more accurate information than it may have about commutation, it is more likely jurors would look at the California Penal Code section 190.3 factors relevant to determining life without possibility of parole or death. In this case, that likelihood was only enhanced by the added admonition not to consider the possibility of commutation in reaching a decision as to penalty.

The majority's conjecture that the jurors in fact violated their oath and speculated about commutation after being expressly admonished not to speculate

rests with an untenable departure from the well established presumption that jurors follow instructions. Francis v. Franklin, 471 U.S. 307, 324, n. 9 (1985); Delli Paoli v. United States, 352 U.S. 232, 242 (1957). The jurors were expressly told not to use the commutation instruction in determining penalty. As the California Supreme Court concluded, there is "no reason to believe that the jurors failed to discharge their duty." Hamilton II, 45 Cal. 3d at 375.

The jury was given accurate information about commutation and was then told it was not something for the jury to consider in determining penalty because commutation was a matter for the responsible government officials as limited by law. Ramos tells us that the giving of accurate information about commutation does not create an error,

accordingly, there was no error in Hamilton's case.

Reexamination of a state conviction on federal habeas frustrates California's power to punish offenders and its "good faith attempt to honor constitutional rights." McCleskey v. Zant, 499 U.S. 467 (1991), citing other authority. The federal court system has an undeniably important duty to perform in safeguarding constitutional rights. However, a federal court conducting habeas review "is limited to deciding whether a conviction violated the Constitutional, law, or treaties of the United States." 28 U.S.C. § 2241; Estelle v. McGuire, 502 U.S. ____, 116 L. Ed. 2d 385, 396, 112 S. Ct. 475 (1991). It is "not the province of a federal habeas court to reexamine state court determinations on state law questions." Id.

The Ninth Circuit's end run around this Court's opinion in Ramos has served to reverse a valid judgment of death in the absence of any constitutional infirmity. Moreover, the published opinion threatens the reversal of a number of other capital cases pending federal habeas review, wherein the same instruction was given. Accordingly, Petitioners respectfully urge this Court to grant certiorari and resolve this important question of law.

II

A FEDERAL COURT SHOULD NOT SET ASIDE A STATE COURT DEATH SENTENCE BASED ON PURPORTED INSTRUCTIONAL ERROR IN THE PENALTY PHASE WITHOUT APPLYING THE REASONABLE LIKELIHOOD TEST ENUNCIATED BY THIS COURT IN BOYDE V. CALIFORNIA AND THE APPROPRIATE HARMLESS ERROR STANDARD

Independent of ignoring this Court's holding in Ramos, the majority's result is inconsistent with the approach this Court enunciated for determining if a

challenged instruction was applied in an unconstitutional manner. The proper inquiry is not whether the challenged instruction "could have been" applied in an unconstitutional manner, but whether there is a reasonable likelihood the jury did so apply it. Victor v. Nebraska, Sandoval v. California, ___ U.S. ___, 127 L. Ed. 2d 583, 62 U.S.L.W. 4179, 4180 (1994); Estelle v. McGuire, 502 U.S. ___, n. 4; Boyde v. California, 494 U.S. at 370, 386.

While acknowledging that the reasonable likelihood test of Boyde is stringent, the Ninth Circuit majority nonetheless finds error after concluding the test is not as stringent as seen by the dissent. Hamilton v. Vasquez, ____ F.3d. ____; Appendix A. at 59. In reality by engaging in its own speculation in order to find jury speculation, the

majority departs from the holding of this Court.

The majority's speculation that the jury was misled "where the trial court told the jury not to consider what it had just been instructed were relevant considerations" (Hamilton v. Vasquez, ___ F.3d ___; Appendix A. at 58) is wrong for two reasons. First, the jury was told commutation was not a relevant consideration. The jury was told to ignore commutation and do its task based on the evidence and California Penal Code section 190.3 factors. Second, the majority's assumption that the jury in fact was confused by the commutation instructions and voted for death, ignores the fact that the jury spent three days deliberating the penalty.

While the majority suggests that the length of the deliberation indicated this was a "close case" (Hamilton v.

Vasquez, ___ F.3d ___; Appendix A. at 55-56), it ignores the obvious. Why did the jury deliberate for three full days if it violated its oath, and in fact considered what it was told not to consider or to believe, i.e. that Hamilton would likely be released on parole in under 17 years? Had the jury been misled in the manner suggested by the majority opinion, it would have returned a speedy penalty verdict.

As the California Supreme Court found after finding no prejudice from the instruction based on a violation of the California Constitution, the trial court's instructions:

> ". . . directed the jurors not to make any use of the Briggs instruction in determining the penalty to be imposed on defendant. Jurors are, of course, presumed to follow the instructions given by the court. (E.g., Delli Paoli v. United States, (1957) 352 U.S. 232, 242, [1 L. Ed. 2d 278, 285-286, 77 S. Ct. 294].) In this case we find no reason to

> believe that the jurors failed to discharge their duty." Hamilton II, 45 Cal.3d at 375.

On habeas, non-systemic constitutional error is judged by the Kotteakos harmless error standard. Brecht v. Abrahamson, 123 L. Ed. 2d at 373. That standard, normally applied to non-constitutional error on direct appeal, allows reversal only where the error had "substantial and injurious effect or influence in determining the jury's verdict." Kotteakos v. United States, 328 U.S. 750, 776 (1946). Under Brecht, the defendant has the burden of proving the alleged error was not harmless. O'Neal v. Morris, 3 F.3d 143 (6th Cir. 1993), cert. granted April 4, 1994, No. 93-7407, 62 U.S.L.W 3680. The majority opinion does not undertake any harmless error analysis or state under what standard it found prejudice when it reversed this penalty.

If telling a jury about a governor's power to commute or modify a sentence of life without possibility of parole does not violate the Constitution (California v. Ramos, 463 U.S. at 105), adding information about what happens under state law does not change the conclusion. In fact, the added information favors Hamilton by showing the significant legal impediments to any possibility that he might ever be freed from prison. The dissent and the district court judge correctly observed that the modification agreed to by the parties "improved the unmodified Briggs [commutation] instruction from the defense perspective." Hamilton v. Vasquez, ___ F.3d ___; Appendix A. at 87; Appendix B. at 248.

The evidence in this case was very strong and the crime was "monstrous." Appendix A, (Trotter, J., dissent) at 98.

Any error in the commutation instruction was harmless. This was an ultimate penalty case and an ultimate penalty defendant. As the dissent observes, "the weak mitigating evidence cited by the majority fades into utter insignificance" when measured against the brutal slaying of Eleanore Buchanan, who was still nursing her three-week old baby boy before Hamilton severed her head and hands with saws and knives. Id., at 97-98.

That baby boy is about to celebrate his 15th birthday. The prejudice to the state from the reversal at this time is obvious. When a habeas petitioner succeeds in obtaining a new trial, the government is prejudiced by the long passage of time and has a diminished chance of a reliable criminal adjudication. McCleskey, 499 U.S. 467; see also, In re Blodgett, 502 U.S. ___, 116 L. Ed. 2d 667, 112 S. Ct. 674 (1992)

[recognizing the state's strong interest in finality of judgments and the need for "prompt resolution" of habeas cases]; United States v. Sudthisa-Ard, ___F.3d ___ [Dock. No. 92-50375] (9th Cir. 1994) [Ninth Circuit finds it unconscionable to allow a federal defendant to benefit from a 13-year delay by forcing the government to re-prosecute after memories have dimmed and evidence has been lost].

The only prejudice in this case is to the state from the Ninth Circuit opinion reversing a death sentence in the absence of constitutional infirmity. The majority's holding rests with a misinterpretation of the instruction given below and a misinterpretation of Ramos and Boyde.

Furthermore, even if there were constitutional error in the penalty phase of this case, it would be harmless in view of the quality of the mitigating evidence

offered when weighed against Hamilton's crime and prior record of violence and convictions.

III

THE MAJORITY RETROACTIVELY APPLIES A "NEW RULE" OF CONSTITUTIONAL LAW ON COLLATERAL REVIEW THROUGH ITS MISINTERPRETATION OF RAMOS

As detailed above, despite the fact that the California commutation instruction survived constitutional challenge in California v. Ramos, 463 U.S. 992, the majority found a violation of the due process clause by the modifications made to the commutation instruction in this case. Where Ramos decided that the commutation instruction alone does not invite jury speculation or do more than accurately portray the alternate punishment to death, the Ninth Circuit two judge majority opinion draws the opposite conclusion about the instruction given below, despite the fact that the jury was

expressly told not to speculate about commutation or consider commutation when arriving at its verdict. By finding a violation of due process in an instruction more favorable to the defendant than the one considered by Ramos, the two judge majority opinion creates a "heads you lose, tails you lose" death penalty jurisprudence.[4] The Ninth Circuit's departure from the precedent of Ramos constitutes a new rule of constitutional law which cannot be applied to Hamilton on collateral review. Teague v. Lane, 489 U.S. 288, (1989); Saffle v. Parks, 494 U.S 484 (1990); Caspari v. Bohlen, 510 U.S.

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4. The irony produced by the two judge decision is that an unvarnished commutation instruction will result in a reversal under California, but not federal, decisions, while a modified instruction is harmless in California, but reversible in the Ninth Circuit.

____, 127 L. Ed. 2d 236, 114 S. Ct. 948 (1994).[5]

Generally, new rules of constitutional law will not be applied or announced in cases on collateral review. Teague v. Lane, 489 U.S. at 301. This limitation on relief is equally applicable to capital cases. Graham v. Collins, 506 U.S.___, 122 L. Ed. 2d 260, 113 S. Ct. 892, 897 (1993).

The Ninth Circuit failed to determine "as a threshold matter, whether granting him the relief he seeks would create a 'new rule' of constitutional law." Graham v. Collins, 113 S. Ct. at 897.

A holding creates a "new rule" of law, if it "breaks ground," "imposes a

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5. Teague was not argued in district court or in the Ninth Circuit because Ramos was clearly in favor of the judgment. The new rule arose when the majority made an unexpected departure from Ramos and Boyde.

new obligation on the States or Federal Government," or was not "dictated by precedent existing at the time the defendant's conviction became final." Teague, 498 U.S. at 301. As the expansive procedural history of Hamilton's case detailed above shows, his conviction is clearly final.

In "surveying the legal landscape as it then existed . . . it would have been anything but clear to reasonable jurists" (Graham v. Collins, 113 S. Ct. at 898) in 1981 that the commutation instruction given below was constitutionally infirm. The state is entitled to rely on this Court's unambiguous holding in Ramos permitting the state to inform jurors regarding their penalty choices, including a discussion of commutation.

There are two exceptions to the general principle of law announced in

Teague. Neither of the exceptions has any application in this case.

The first exception permits retroactive relief from a new rule, if the rule of law "places a class of private conduct beyond the power of the State to proscribe" (Teague, 489 U.S. at 311) or relates to a "'substantative categorical guarantee accorded by the Constitution,' such as a rule 'prohibiting a certain category of punishment for a class of defendants because of their status or offense.'" Saffle v. Parks, 494 U.S. at 494. quoting Penry v. Lynaugh, 492 U.S. 302, 330 (1989). This exception is clearly not applicable to Hamilton. Hamilton's effort to obtain a rule of law precluding the commutation instruction given below would not "decriminalize a class of conduct" or prohibit the "imposition of capital punishment on a particular class of persons." See, Graham

v. Collins, 113 S. Ct. at 903. The second exception to Teague is no more availing.

The second exception permits federal court to announce "'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." Saffle v. Parks, 494 U.S. at 495, quoting Penry v. Lynaugh, 492 U.S. at 330. This second exception:

> "is clearly meant to apply only to a small core of rules requiring '"observance of 'those procedures that . . . are 'implicit in the concept of ordered liberty.'"'" Graham v. Collins, 113 S.Ct. at 903, quoting Teague, 489 U.S. at 311, quoting Mackey v. United States, 401 U.S. 667, 693, 28 L.Ed.2d 404, 91 S.Ct. 1160 (Harlan, J., concurring & dissenting) (1971).

In noting the absence of this second exception to Teague regarding an Eighth Amendment challenge to the capital sentencing scheme in Texas, this Court recently observed:

> "As the plurality cautioned in Teague, `[b]ecause we operate from the premise that such procedures would be so central to an accurate determination of innocence or guilt, we believe it unlikely that many such components of basic due process have yet to emerge.'" Graham v. Collins, 113 S.Ct. at 903, quoting Teague, 489 U.S. at 313.

Nothing in the jury's awareness of commutation law and the admonition not to consider commutation "seriously diminish[ed] the likelihood of obtaining an accurate determination" in Hamilton's capital sentence proceeding. Accordingly, by applying their decision retroactively, the Ninth Circuit has carved out a new exception to Teague which essentially swallows the rule itself. The Ninth Circuit two judge majority should not be permitted to reverse state death sentences on collateral review in contravention of Teague.

CONCLUSION

The injustice of reversing capital cases because an instruction was more favorable to a defendant than one already approved by this Court affects more than the judgment in this case and those similarly situated. It serves to engender disrespect for the judicial system by its citizenry, who should not be expected to accept such a result under the guise of justice.

For all of the reasons stated herein, Petitioners respectfully urge that the Court once again grant certiorari in this matter and resolve the important issues of law presented herein; or alternatively reverse and remand the judgment of the Ninth Circuit in light of

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this Court's decisions in California v. Ramos, 463 U.S. 992, Boyde v. California, 494 U.S. 370, Brecht v. Abrahamson, 507 U.S. ___ and Teague v. Lane, 489 U.S. 288.

DATED this 19th day of April 1994.

Respectfully submitted,

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No: 93 _____
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v.

BERNARD LEE HAMILTON,
Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 1100, San Diego, California 92186-5266.

I have served the within PETITION FOR WRIT OF CERTIORARI WITH APPENDICES 1 AND 2 as follows: To William K. Suter, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and forty (40) copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing one copy in a separate envelope addressed for and to each addressee named as follows:

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Each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at San Diego, California, on the 19th day of April 1994.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, April 19, 1994.

Anne Marie Buford
ANNE MARIE BUFORD

Subscribed and sworn to before me
this 19th day of April 1994.

Jean M. Burns
Notary Public in and for said County and State

JEAN M. BURNS
NOTARY PUBLIC – CALIFORNIA
THE COUNTY OF SAN DIEGO
My Commission Expires Sept. 17 1995